

**Co-Lead Class Counsel's Response to the NFL's Appeal of the Special Masters' Ruling Regarding the "Generally Consistent" Standard**

**PRELIMINARY STATEMENT**

Under the terms of the Settlement Agreement, the Court's July 13, 2016 Order appointing the Special Masters, and the Rule Governing Appeals of Claim Determinations, the NFL does not have the right to appeal the Special Masters' October 18, 2018 decision denying its Objection. The Special Masters clearly stated that their decision was a final and binding factual determination, as opposed to an appealable conclusion of law. Accordingly, the NFL's appeal is improper and should not be entertained.

With respect to the substance of the NFL's appeal, Co-Lead Class Counsel agrees with the NFL that the Settlement Agreement was heavily negotiated and that both sides must live up to its negotiated terms. However, the NFL now requests this Court "to construe the 'generally consistent' standard for Level 1.5 and Level 2 Neurocognitive Impairment diagnosed outside of the BAP to preclude a Qualifying Diagnosis where the BAP test battery is applied and the results fail to satisfy the BAP diagnostic criteria." Brief at 2. That is, the NFL argues for a "specifically identical" standard that appears nowhere in the Settlement Agreement. Indeed, it is clear that the NFL does not want to live up to the negotiated terms of the Settlement Agreement and is unwilling to accept one of the most fundamental and important agreed-upon provisions of the Settlement Agreement. Specifically, the NFL asks the Court to re-write the Settlement Agreement so that the negotiated and judicially-approved "generally consistent" standard would not apply to those Retired Players who exercised one of the fundamental rights afforded by the Settlement Agreement and obtained their Qualifying Diagnosis from a Qualified MAF Physician.

While the NFL discusses the importance of the negotiated BAP diagnostic criteria ("precise T-score cutoffs as well as disability requirements across five cognitive domains" – Brief at 3), the

NFL never once acknowledges that the Parties specifically agreed that all Qualifying Diagnoses obtained **outside of the BAP** are to be evaluated differently than Qualifying Diagnoses obtained **in the BAP**. Therefore, while Qualifying Diagnoses obtained in the BAP must, by definition, satisfy the strict BAP diagnostic criteria found in the Settlement Agreement, Qualifying Diagnoses obtained outside of the BAP need only be “generally consistent” with the BAP diagnostic criteria. This difference in diagnostic criteria for evaluating Qualifying Diagnoses is a cornerstone of the Settlement Agreement and cannot be disturbed.

## **ARGUMENT**

### **I. The NFL’s Current “Appeal” is Improper**

#### **A. The Decision of the Special Master Was “Final and Binding”**

Under the terms of the Settlement Agreement and the Court’s July 13, 2016 Order appointing the Special Masters, the NFL does not have the right to seek Court review of the Special Masters’ October 18, 2018 decision.<sup>1</sup> As agreed to by the Parties, objections to the Special Masters’ determinations are only permitted as to “conclusions of law,” designated as such by the Special Masters. The relevant portion of the July 13<sup>th</sup> Order states:

If an appeal is referred to the Master(s), the parties agree, pursuant to Fed. R. Civ. P. 53(f)(3), that the **factual determinations of the Master(s) will**

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<sup>1</sup> The NFL frames its challenge to the decision of the Special Masters as an “appeal.” However, none of the parties to the Settlement have any right to appeal the Special Masters’ determination of a Notice of a Monetary Award appeal. Rather, the parties only enjoy the right to “object” in clearly limited circumstances to the findings of the Special Masters. Under the Settlement Agreement and July 13, 2016 Order, the term “appeal” specifically refers to a Party’s challenge of the Claims Administrator’s Notice of Monetary Award Claim Determination, whereas an “objection” refers to a Party’s challenge of a Special Masters’ conclusion of law in a determination on appeal. Therefore, the NFL’s current “appeal” is really an “objection” to the Special Masters’ determination on appeal. While the Parties have the right to appeal from a Notice of Claim Determination, no Party has the right to “appeal” a Special Masters’ determination. The distinction is important here because the Settlement Agreement and Order appointing the Special Masters make it clear that the right to file an “objection” to the Special Masters’ determinations on appeal is limited and does not permit the instant objections by the NFL.

**be final and binding. Pursuant to Fed. R. Civ. P. 53(f)(4), the court will review de novo any objection to the Master(s) conclusions of law.**

(See July 13, 2016 Order at 5) (emphasis added). Similarly, the Rules Governing Appeals of Claim Determinations, promulgated by the Special Masters, state that the Special Masters' decisions on appeal are **not** generally subject to appeal, but “. . . **the Court will review *de novo* (that is, anew) any objection to the Special Master's conclusions of law.** (See Rule 31) (emphasis added).

Rule 31 of the Rules Governing Appeals of Claim Determinations further establishes that, for the purposes of the appeals process, the Special Masters are the ones who determine whether there is a conclusion of law properly subject to review by the Court. Rule 31 makes clear that only conclusions of law, as determined by the Special Masters, may be objected to:

**Rule 31. Finality of the Special Master's Decision.** *The Special Master's decision on an Appeal is final and binding on the Settlement Class Member(s), the Parties to the Appeal and the Claims Administrator and is not subject to appeal or review by the Court, except that pursuant to Fed. R. Civ. P. 53(f)(4) and the Court's July 13, 2016 Order appointing the Special Masters, the Court will review de novo (that is, anew) any objection to the Special Master's conclusions of law. The Special Master will identify in each decision any issue the Special Master determines to be a conclusion of law to which a Party to the Appeal may object and have reviewed by the Court.*

(emphases in italics and underlines added).

Though the NFL provided comments and proposed revisions to other provisions of the Rules Governing Appeals Claim Determinations, they did not raise any concerns with the quoted language from Rule 31. Accordingly, as agreed among the parties, “the factual determinations of the Master(s) will be final and binding” and the Special Masters' determinations are only reviewable by the Court if the Special Masters identify a conclusion of law.

The Special Masters did not identify any conclusions of law in this instance and, therefore, the NFL's initial objection was improper. In a Settlement where application of each of the thoroughly negotiated definitions for Qualifying Diagnoses will inevitably turn on facts, it is clear

why the NFL would want finality of factual findings made by the Special Masters – denials of claims would reach conclusion with a decision by the Special Masters. The same must hold true for the NFL’s appeals of approved claims. With each of the claims subject to the NFL’s appeal and objection efforts, the Special Masters stated in the “Explanation of Claim Determination” section of the Post-Appeal Notices of Monetary Award Determination that “(t)he Special Master’s decision is a factual determination and is final and binding.” More importantly, the Special Masters stated clearly that their October 18, 2018 is a final factual finding, not an appealable legal conclusion: “For the reasons stated above, the NFL Parties may not object [to the Court] to the determinations of the Special Master.”

#### **B. The NFL Cannot Concoct a Basis for Court Review**

Notwithstanding the foregoing directive from the Special Masters, the NFL is undeterred. The NFL now seeks to clear a path to object to the decision by arguing that the Special Masters may not decide whether their decision turned on factual findings or whether there is a conclusion of law that may be brought to the Court for review. At issue on this appeal are the definitions for Qualifying Diagnoses of dementia made outside of the BAP, and “generally consistent” with those BAP definitions for dementia. At bottom, the NFL argues that any decision by the Special Masters regarding a dementia diagnosis made outside of the BAP is inevitably subject to Court review, even when it is otherwise final and binding.

To avoid the simple fact that it lost its initial appeals and objection on factual grounds, the NFL makes two arguments. First, it argues against the plain language of the Order Appointing Special Masters and the governing Rules contending that it did not or could not consent to the finality of factual findings. Second, it argues that diagnosis of players under the “generally consistent” standard is not rooted in the medical facts of each case, but instead is a legal question.

Both arguments are ill-founded. The NFL's efforts to now force Court review of a "final and binding" decision by the Special Masters should not be rewarded.

**1. The NFL Agreed that the Special Masters' Findings of Fact Were to Be "Final and Binding" and Not Subject to Court Review**

There is no further appeal available once the Special Masters deem their decision to be a factual determination rather than a conclusion of law. Parties may consent to the referral of any and all matters to a Special Master for determination, and such consent can exclude all rights to object to the decision of a Special Master so long as the findings were within the scope of consent. *See Baker Indus., Inc. v. Cerberus, Ltd.*, 570 F. Supp. 1237, 1242 (D.N.J. 1983), *aff'd*, 764 F.2d 204 (3d Cir. 1985) ("the Court then noted that Federal Rules of Civil Procedure do not prohibit such a stipulation, that it could see no difficulty with the parties' waiver of whatever statutory rights of appeal that they might have, that the master's findings would not be final to the extent that he exceeded the scope of his reference, that the master would have full power to decide the issue of breach and remedy, and that the master's decision would not be reviewable by this Court or any other Court.") The NFL agreed to a regimen for appeals of Notices of Denial of Monetary Awards and Notices of Monetary Awards that end with the Special Masters when the Special Masters determine that there are no appealable conclusions of law. The NFL would clearly cry foul if any player sought Court review of findings of fact or a determination that there were no appealable questions of law in a decision affirming denial of a dementia claim.

**2. The Special Masters' Determination that There Is No Reviewable Conclusion of Law Is Correct**

The NFL's argument that the definitions of Qualifying Diagnoses made outside of the BAP are a legal question or, at least, a mixed question of fact and law, should not be entertained. The NFL argues simply that because the Settlement Agreement is unambiguous as to the definition for

diagnoses obtained outside of the BAP, the matter is a question of law. However, each of the definitions of Qualifying Diagnoses underlie almost every one of the appeals taken - whether by a player who believes that he was properly diagnosed in the first instance and wrongly denied a Monetary Award, or by the NFL who believes that the facts of the Claim Package do not support the Qualifying Diagnosis. If taken seriously, the NFL's argument would render meaningless the "final and binding" nature of Special Masters' decisions in this Settlement, particularly as to whether or not a Qualifying Diagnosis is or is not supported by the facts of each player's claim. Under the NFL's view, each decision by the Special Masters regarding a claim would be transformed into an appealable question of law ("is this what the definition was meant to mean?") or a mixed question of facts and law ("do these facts really fit this definition?").

The Supreme Court has made clear that there is no such bright-line rule in determining whether a matter is factual or legal for the purposes of appellate review: "the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive. . . . Perhaps much of the difficulty in this area stems from the practical truth that the decision to label an issue a 'question of law,' a 'question of fact,' or a 'mixed question of law and fact' is sometimes as much a matter of allocation as it is of analysis." *Miller v. Fenton*, 474 U.S. 104, 113-14 (1985)<sup>2</sup>; *see also Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) ("The Court has previously noted the vexing nature of the distinction between questions of fact and questions of law.").

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<sup>2</sup> The Supreme Court went on to discuss a practical solution to the problem which further supports the wisdom in according deference to the Special Masters determination of the factual or legal nature of the issues under decision: "[when] the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Id.* at 114.

The Special Masters recognized this challenge and properly determined that review of the appeals being taken by the NFL was a review of the facts presented in each of the individual claims. October 18, 2018 Decision, p. 2, n. 1. Given the essentially fact-specific nature of the “generally consistent” standard at the heart of diagnoses made outside of the BAP, the kind of case by case, factual approach taken by the Special Masters is particularly apt. *See Pierce v. Underwood*, 487 U.S. 552, 562 (1988) (“whether the Government’s litigating position has been ‘substantially justified’ is precisely such a multifarious and novel question, little susceptible ... [to] useful generalization, and likely to profit from the experience that an abuse-of-discretion rule [to findings of fact] will permit to develop.”)

Accordingly, the NFL’s appeal of the Special Masters’ October 18, 2018 decision denying the NFL’s Objection is improper and should not be reviewed by the Court.

## **II. Qualifying Diagnoses Made Outside the BAP Are to Be “Generally Consistent” With, Not Identical to, the Diagnostic Criteria for Qualifying Diagnoses Made Within the BAP**

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The Settlement Agreement is clear that the diagnostic criteria for Qualifying Diagnoses made outside the BAP, which includes diagnoses rendered by Qualified MAF Physicians and pre-Effective Date diagnoses rendered by board-certified neurologists, need not be identical to the diagnostic criteria for diagnoses made in the BAP. Six of the seven Retired Players subject to the NFL’s appeal were diagnosed with Level 1.5 Neurocognitive Impairment.<sup>3</sup> The specific BAP diagnostic criteria for Level 1.5 Neurocognitive Impairment can be found in subsection 1(a)(i)-(iv) of Exhibit A-1 to the Settlement Agreement. Subsection 1(b) of Exhibit A-1 then makes clear which “diagnostic criteria” are subject to the “generally consistent” standard. Subsection 1(b) states in relevant part:

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<sup>3</sup> The remaining Retired Player was diagnosed with Level 2 Neurocognitive Impairment.

For living Retired NFL Football Players diagnosed outside of the BAP, a diagnosis while living of Level 1.5 Neurocognitive Impairment, *i.e.*, early dementia, **based on evaluation and evidence generally consistent with the diagnostic criteria set forth in subsection 1(a)(i)-(iv) above**, . . . made by a Qualified MAF Physician or a board-certified or otherwise qualified neurologist, neurosurgeon, or other neuro-specialist physician, as set forth and provided in Sections 6.3(b)-(d) of the Settlement Agreement.

(emphasis added).

Despite the clear language setting forth the application of the “generally consistent” standard to all dementia diagnoses made outside of the BAP, it is the very specific diagnostic criteria set forth in subsection 1(a)(i)-(iv) of Exhibit A-1, that the NFL seeks to enforce on Qualifying Diagnoses rendered outside of the BAP. The NFL’s position is contrary to the plain language of the Settlement Agreement.

To begin, it must be noted that the “generally consistent” standard, as well as which Qualifying Diagnoses are subject to it, is a product of the parties’ negotiations, which, by design, specifically does not require the identical diagnostic criteria for Qualifying Diagnoses made outside of the BAP. Rather, it empowers Qualified MAF Physicians, who have been approved by both parties and have received extensive training in the various Qualifying Diagnoses recognized by the Settlement Agreement, as well as board-certified neurologists who rendered pre-Effective Date diagnoses, to use their experience and medical judgment to make appropriate diagnoses after personal examination of the Retired Player **outside of the BAP** without belated second-guessing. In addition, it guides the Claims Administrator to affirm MAF Qualifying Diagnoses even though different testing and evaluation criteria may have been utilized by the Qualified MAF Physician, so long as such testing and evaluation is “generally consistent” with the diagnostic criteria for the particular Qualifying Diagnosis as defined in the Settlement Agreement.



The NFL's position, as expressed repeatedly throughout its appeals and objections, is that Qualifying Diagnoses made outside of the BAP must meet the same exact diagnostic criteria as those Qualifying Diagnoses made in the BAP, effectively ignoring the "generally consistent" language found in Section 1(b) of Exhibit A-1 of the Settlement Agreement. The NFL's initial appeals, Objections, and current appeal demonstrate that the NFL wants "generally consistent" to be deleted from the Settlement Agreement with respect to Qualifying Diagnoses made outside of the BAP. The parties, in drafting the Settlement Agreement, recognized the importance of the "generally consistent" standard and foresaw the possibility of the NFL's current argument with respect to the application (or non-application) of "generally consistent" to Qualifying Diagnoses made outside of the BAP. That is why the parties added the following language to the Settlement Agreement: "For the avoidance of any doubt, the review of whether a Qualifying Diagnosis is based on principles generally consistent with the diagnostic criteria set forth in Exhibit 1 (Injury Definitions) **does not require identical diagnostic criteria, including without limitation, the same testing protocols or documentation requirements.**" (Settlement Agreement §6.4(b)) (emphasis added).

The NFL's current attempt to delete "generally consistent" from the Settlement Agreement through the Objection and Appeal process is improper, taken in bad faith, and must be rejected. Aside from the Settlement Agreement's clear language on this issue, the Special Masters have weighed in on this very issue. FAQ 95 (entitled "What does 'generally consistent' mean?") states in relevant part:

Something is "generally consistent with" something else if the two things have more elements or characteristics in common with each other than they have elements or characteristics that differ from each other. The common elements or characteristics must predominate over the uncommon ones.

The Settlement Agreement states specifically that diagnostic criteria for a diagnosis made outside the BAP do not have to be identical to the diagnostic criteria for a diagnosis made in the BAP. The diagnostic criteria, or the medical rules the doctor must follow to make the diagnosis, outside the BAP do not have to be 100% the same as the Exhibit 1 criteria.

Despite the language of FAQ 95, the NFL repeatedly argues that these players' test results are insufficient to support a monetary award based on a non-BAP diagnosis of Level 1.5 Neurocognitive Impairment, even though the Qualified MAF Physicians (who personally examined the players) concurred with the board-certified neuropsychologists (who also personally examined the players) and found those test results to be "generally consistent" with the BAP's diagnostic criteria for Level 1.5. Crucially, these Qualified MAF Physicians have received training on the diagnostic criteria in the Settlement, including the BAP criteria as well as the "generally consistent" standard that guides diagnoses outside the BAP. The NFL argues that test results that fall short of the strict BAP diagnostic criteria cannot, by definition, support a Qualifying Diagnosis made outside of the BAP, even though the NFL is fully aware that the "generally consistent" standard applies to these Retired Players' claims since they were all diagnosed outside the BAP.

In denying the NFL's Objection, the Special Masters concluded that:

"... based on the definition of "generally consistent" set forth in FAQ 95, ... the six appeals as issue fail to establish by clear and convincing evidence that there are more differences than commonalities between the medical support for the Qualifying Diagnosis and the relevant diagnostic criteria."

(Special Master 10/18/18 Decision at 3). The NFL argues that the "Special Master's interpretation of the "generally consistent" standard upends the bargained-for and judicially-approved neuropsychological testing regime." (Brief at 4). The NFL's argument is ironic considering that what the NFL is requesting this Court to do -- apply the same diagnostic criteria to Qualifying Diagnoses obtained in the BAP as those obtained outside the BAP -- is specifically contrary to the

“bargained-for and judicially-approved” terms of the Settlement Agreement. The Special Masters’ ruling not only does not “upend” the terms of the Settlement Agreement, it upholds one of the most important and fundamental provisions of the Settlement Agreement. That is, Qualifying Diagnoses obtained outside of the BAP do not have to satisfy the same diagnostic criteria as those Qualifying Diagnoses obtained in the BAP.

The specific facts of these players’ claims illustrate the extent to which the NFL’s argument, if accepted, would result in unjust and bizarre results. Co-Lead Class Counsel will defer to the individually retained counsel with respect to the presentation and argument of case-specific issues. Please note, however, that Co-Lead Class Counsel did submit statements with respect to the NFL’s initial appeals of four of the Retired Players subject to the current Appeal (SPID 100000070, 100009422 100013190, and 100005741), which addressed certain case-specific facts. Those redacted statements are attached hereto as Exhibits 1, 2, 3 and 4.

### **III. Retired Players Who Obtain a Qualifying Diagnosis From a Qualified MAF Physician Rather Than Through the BAP Are Acting In Accordance With the Terms of the Settlement Agreement**

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The NFL’s appeal focuses on those Retired Players who had a choice between obtaining a Qualifying Diagnosis either through the BAP process or from a Qualified MAF Physician. In so doing, the NFL improperly invites speculation as to the reason that any Retired Player chose to see a Qualified MAF Physician as opposed to a BAP Provider. The express terms of the Settlement Agreement provide two separate paths for obtaining a Qualifying Diagnosis for those Retired Players who do not have a pre-Effective Date Qualifying Diagnoses. Retired Players have the

right to pursue either path, for whatever reason they wish.<sup>4</sup> Though Retired Players' reasons are irrelevant to the analysis, the NFL ignores the many valid factors that may influence the decision.

These reasons include:

- At the time the Retired Players subject to this Appeal were deciding whether to see a Qualified MAF Physician or a BAP Provider, there were substantial wait times for BAP appointments in some cities,<sup>5</sup> which was a particular concern for Retired Players who were facing an approaching birthday and additional offsets for age. Qualified MAF Physicians were sometimes more flexible with respect to scheduling.
- Many Players want to control the scheduling of their own appointments as opposed to coordinating through the BAP Administrator, who schedules all BAP appointments.
- A Retired Player may already be under the care of a neurologist or other medical professional and, therefore, their "baseline" has already been established. For those Players, the BAP examination is not as useful as it is for those Retired Players whose "baseline" has not yet been established.

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<sup>4</sup> The NFL improperly assumes that all Retired Players have the choice to obtain their Qualifying Diagnoses either from a Qualified MAF Physician or from a BAP Provider. Many Retired Players do not, or will not, have that choice. For example, Retired Players who did not earn at least half an Eligible Season are not BAP-eligible, but they are eligible to submit Monetary Award Claims. Accordingly, their only option is to obtain a Qualifying Diagnosis from a Qualified MAF Physician. Likewise, there are Retired Players who already went through the BAP process and were not symptomatic and, accordingly, did not receive a Qualifying Diagnosis. Since the Settlement Agreement only allows each BAP-eligible Retired Player one BAP examination, if a Retired Player's condition worsens over time (which is likely to happen in many cases), he may only obtain a Qualifying Diagnosis from a Qualified MAF Physician. Lastly, since the BAP program is only in existence for 10 years, all Retired Players who become symptomatic after 10 years will not have the option to see a BAP provider. Rather, their only option will be to see a Qualified MAF Physician.

<sup>5</sup> Under the on-going efforts of the BAP Administrator, the network of BAP Providers has constantly increased and the concern with wait times has been substantially addressed.

- BAP Providers can only diagnose Retired Players with dementia (Levels 1, 1.5, and 2 Neurocognitive Impairment), whereas MAF Physicians can diagnose a Retired Player with any Qualifying Diagnosis (except Death with CTE). Therefore, any Retired Player who thinks he may be suffering from Alzheimer's disease, for example, would be better served going to a Qualified MAF Physician, who is permitted by the Settlement Agreement to render an Alzheimer's diagnosis, rather than a BAP Provider who cannot.

There may be as many valid reasons as there are appointments with Qualified MAF Physicians. In any event, those Retired Players are simply exercising a right provided to them by the Settlement Agreement. In fact, all of the Retired Players subject to the NFL's current appeal followed the rules set forth in the Settlement Agreement. That is, since they did not have a Qualifying Diagnosis from a qualified physician prior to the Effective Date, they were required to select a doctor from a prescribed list of MAF/BAP physicians, all of whom have been vetted and approved by the NFL. The Retired Players were examined by a Qualified MAF Physician and received a Qualifying Diagnosis. They then submitted the required Claim Form, and the medical records and signed Diagnosing Physician Certification form from their Qualified MAF Physician. All of these Retired Players followed the rules, their claims were approved by the Claims Administrator, and they received a Notice of Monetary Award Claim Determination.

The Settlement Agreement requires that all Retired Players who obtain a post-Effective Date diagnosis outside of the BAP be treated the same, regardless of their reason for obtaining their Qualifying Diagnosis through the MAF. The Settlement Agreement does not provide a different diagnostic standard of review based on the Retired Player's reason for obtaining their Qualifying Diagnoses from a Qualified MAF Physician (i.e. they were not BAP-eligible, they diagnosed after expiration of 10-year BAP program, they already went through the BAP process

without obtaining a diagnosis, etc.). In short, the claims of all Retired Players who obtained their Qualifying Diagnoses outside of the BAP must be treated the same and their diagnoses must be reviewed under the same diagnostic standard (“generally consistent”), which specifically does not require the identical diagnostic criteria as Qualifying Diagnoses obtained in the BAP process.

For the NFL now to accuse these Retired Players of trying to undermine the settlement program by trying to “buy” a relaxed diagnostic standard (a standard which the Settlement Agreement requires to be applied to all Qualifying Diagnoses obtained outside of the BAP process) is outrageous.

**IV. The NFL’s Request, If Granted, Would Re-Write the Settlement Agreement With Respect to the Application of the “Generally Consistent” Standard**

The Settlement Agreement, as agreed to by the parties and approved by the Court, identifies two categories of Qualifying Diagnoses: 1) those obtained in the BAP; and 2) those obtained outside of the BAP. All Qualifying Diagnoses, by definition, fit into one of those two categories. Despite this clear language, the NFL seeks to re-write the Settlement Agreement to add a third category of diagnoses in order to avoid the application of the “generally consistent” standard. The NFL wants to treat certain Qualifying Diagnoses obtained “outside of the BAP” differently than other Qualifying Diagnoses obtained “outside the BAP” based on how the diagnosis was made. To be precise, the NFL does not want the “generally consistent” standard to apply to those Retired Players diagnosed outside of the BAP by a Qualified MAF Physician who utilized the same test battery required by the BAP.<sup>6</sup>

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<sup>6</sup> There is no reason to believe that the NFL’s efforts to twist the “generally consistent” standard will stop at instances where the test battery is identical to that used in the BAP. Rather, if a “specifically identical” standard like the NFL is seeking here is recognized, the NFL will next seek to usurp (as a question of law) the clinical judgment of a Qualified MAF Physician who relies on a test battery that, while not identical, contains many of the same tests.

There is absolutely no support in the judicially-approved Settlement Agreement for the NFL's position. In fact, the NFL's position is directly contrary to the negotiated terms of the Settlement Agreement. The Parties explicitly agreed that the same diagnostic standards would be applied to all Retired Players diagnosed outside of the BAP (i.e. "based on evaluation and evidence generally consistent with the diagnostic criteria required for BAP diagnosis"). There was no discussion, let alone any agreement, that certain Qualifying Diagnoses obtained outside of the BAP would be evaluated under a different diagnostic standard depending on the type of neuropsychological testing utilized by the Diagnosing Physician. That request, if granted, would fundamentally re-write the Settlement Agreement, thereby depriving Retired Players of a fundamental provision of the Settlement Agreement. To re-write the Settlement Agreement at this late date - - after Retired Players no longer have the ability to opt out of the Settlement - - would be unjust. Accordingly, the NFL's request must not be permitted.

### **CONCLUSION**

The Special Masters' October 18, 2018 decision denying the NFL's objection was a final and binding factual determination and, therefore, was not appealable. Accordingly, the Court should deny the NFL's current appeal.

Even if the NFL has a right to appeal the Special Masters' decision, its appeal should be denied because the NFL seeks a governing standard that violates the "generally consistent" standard it agreed to in the Settlement Agreement and stands at odds with the rights of Retired Players.

For the foregoing reasons, the NFL's appeal must be denied.

Respectfully submitted,

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